BANK OF CHINA v. LEE KEE PIN

[O. C. J. (Rigby J.) November 13, 1959]

[Penang — Summons-in-Chambers No. 239 of 1959 in Civil Suit No. 177 of 1959]

Bank and Banking — Banking Ordinance, 1958, ss.3, 5 and 32 — Closure of bank — Whether proceedings to recover debts due amount to "carrying on business" contrary to s.3 — Whether suing under name and title "Bank of . . . ." contrary to s.5 — R.S.C., 1957 O.25 r.4.

The defendant sought for an order that the claim brought against him by the Bank for the recovery of $574,000 being overdraft due and owing from him to the Bank should be dismissed. As a result of the operation of the Banking Ordinance, 1958 the Bank of China, Penang, was compelled to close down and cease banking business in the Federation. The question for consideration was whether the Bank, in attempting to recover the debts due to it, was carrying on business and thereby expressly contravening the provisions of section 3 of the Ordinance in that it was transacting business without a licence. The defendant also argued that the Bank, not being licensed, and in the absence of any consent in writing of the Minister, by bringing the action under the name and title of "The Bank of China" were assuming in relation to their business the word "bank" in direct contravention of section 5 of the said Ordinance.

Held: (1) in seeking to recover the moneys due to them the plaintiffs were not "transacting a banking business" within the meaning of the prohibition contained in section 3 and within the definition of "banking business" as contained in the Ordinance itself;

(2) section 5 must be construed as imposing a prohibition on the use of the word "bank" in relation to a business which is being actually carried on. It cannot be so construed as to place a prohibition upon the plaintiffs suing under the name and title of "The Bank of China" to recover debts allegedly due to them, in the course of winding-up their business.

Cases referred to:—

(1) *Vacher & Sons Ltd.* v. *London Society of Compositors* [1913] A.C. 107 at 127.

(2) *Theophile v. Solicitor-General* [1950] A.C. 186 at 201; [1950] 1 All E.R. 405.

(3) *In re Reynolds* [1915] 2 Q.B. 186 at 189.

(4) *Rawlinson* v. *Pearson* 106 E.R. 1139 at 1140.

APPLICATION UNDER O. 25 r. 4.

B. K. Das (*Chang Min Tat* with him) for the applicant/defendant.

R. D. Hume for the respondents/plaintiffs.

Cur. Adv. Vult.

Rigby J.: This is an application by the defendant Lee Kee Pin trading as Hin Chuan & Co., under Order 25 rule 4 of the Rules of the Supreme Court, for an Order that the claim brought against him by the plaintiffs, the Bank of China, for the recovery of some $574,000 odd — which I will loosely describe as an overdraft due and owing from the defendant to the Bank — should be dismissed. The application is brought on the ground that the Bank's claim to recover these moneys, some of which it has lent to the defendant and some of which it has paid out on his behalf and on his instructions, is frivolous, vexatious and an abuse of the process of this Court; that it discloses no reasonable cause of action and that it should be dismissed.

The application itself is wholly devoid of any equitable merits and depends for its success solely upon a particular construction of certain provisions of the Banking Ordinance, 1958. That Ordinance came into force with effect from the 26th January, 1959. The general purpose and effect of that Ordinance was to provide:—

(1) That no banking business should be transacted in the Federation except by a company in possession of a licence in writing from the Minister of Finance authorising it to do so; and

(2) That no licences should be granted to banks, whether local or foreign, which did not possess the necessary requirements with regard to paid up capital as stipulated in section 4 of the Ordinance.

However, section 32 of the Ordinance contained certain transitional provisions which empowered the Minister, in the case of local banks not possessing the necessary financial qualification, to issue a licence to carry on banking business up to a maximum period of ten years, and in the case of foreign banks to a maximum period of three months.

As an immediate result of this Ordinance the Bank of China was compelled to close down and to cease banking business within the Federation. On the 30th July, 1959, the Bank instituted these proceedings against the defendant to recover the moneys allegedly owing to it.

The practical question for consideration is whether the Bank of China, in attempting to recover the debts due to it, is carrying on business and thereby expressly contravening the provisions of section 3 of the Banking Ordinance in that it is transacting business without a licence.

Section 5(1) of the Ordinance enacts that:—

"5. (1) Except with the consent in writing of the Minister —

(a) a person or body of persons, not being a licensed bank, shall not assume or use in relation to the business or any part of the business carried on by that person or body of persons the word 'bank' or any of its derivatives or any word indicating the carrying on of banking business either in Malay or English or in any other language;"

The additional point is taken that the plaintiffs, not being a licensed Bank, and in the absence of any consent in writing of the Minister, by bringing this action under the name and title of "The Bank of China", are assuming in relation to their business the word "bank" in direct contravention of the provisions of section 5.

It is said that the effect of the Ordinance in so far as the plaintiffs are concerned — the transitional period having elapsed three months after the coming into effect of the Ordinance, namely, on the 25th April, 1959, — was not to extinguish debts due to the plaintiffs, but only to take away from them the right to sue under the name and title of "The Bank of China". It is said that for this Court to entertain the action would be to disobey the Legislature and — to quote the words of Lord Shaw of Dunfermline in the case of *Vacher & Sons, Ltd.* v. *London Society of Compositors*[1] — "would on the part of the judiciary constitute a usurpation". It was suggested that

if the plaintiffs had outstanding debts due to them after the transitional period of three months had elapsed then their remedy might well be to apply to the Court, under the Companies Ordinance, for the Bank to be wound up and a receiver appointed to collect the debts due.

In support of his argument that in trying to recover money it had lent to its clients in the course of its business the Bank was carrying on business, Mr. B. K. Das, for the applicant, cited a number of authorities:— *Theophile* v. *Solicitor-General*[2], *In re Reynolds*[3], and *Rawlinson* v. *Pearson*[4].

As a general proposition I entirely accept the conclusion to be drawn from these cases that, generally speaking, a person or firm does not cease to carry on business merely because "the shutters may have been put up", but continues until the sums due are collected and all debts paid. But the words "bank" and "banking business" are specifically defined in the Banking Ordinance, 1958. "Bank" means "any person who carries on banking business"; and "banking business" means "the business of receiving money on current or deposit account, paying and collecting cheques drawn by or paid in by customers, and making advances to customers". Paragraph 4 of the defendant's affidavit in support of this application states:—

"4. By a notice of action dated 23rd January, 1959, the plaintiffs' solicitors demanded payment of certain sums alleged to be due by me on overdraft account and stated: 'Our clients regret having to take this action but would inform you that under the provisions of the Banking Ordinance, 1958, they have been notified by Government to wind-up their business in terms thereof".

In my view, in seeking to recover the moneys due to them the plaintiffs were and are not "transacting a banking business" within the meaning of the prohibition contained in section 3 and within the definition of "banking business" as contained in the Ordinance itself. As I understand it, the mischief which the Ordinance seeks to avert is to prevent a person or company carrying on banking business in this country without being in possession of the requisite capital paid up in this country. To extend the meaning of the words "transacting banking business" so as to place a prohibition upon the plaintiffs taking action, in the course of winding-up their business, to recover overdrafts allegedly due to them, would be, in my view, to impose upon them an intolerable hardship and injustice not justified by the plain meaning of the words "banking business" as defined in the Ordinance.

Similarly, in my view section 5 must be construed as imposing a prohibition on the use of the word "bank" in relation to a business which is being actually carried on. I do not think that the section can be so construed as to place a prohibition upon the plaintiffs suing under the name and title of "The Bank of China" to recover debts allegedly due to them, in the course of winding-up their business.

For these reasons I am of the opinion, and I so order, that this application be dismissed with costs.

Application dismissed.

Solicitors: *Chang Min Tat; Hogan, Adams & Allan.*

THOMAS COWAN & CO. LTD. v. ORME

[O. C. J. (Chua J.) December 23, 1960]

[Singapore — Suit No. 1609 of 1959]

Contract of personal service — Covenant in restraint of trade — Time — Space — Whether restraint reasonable — Public policy — Monopoly of trade — Severability of covenant — Injunction.

The defendant entered into a contract of service with the plaintiffs who were carrying on business as White Ant and General Pest Exterminators and Fumigators. He covenanted that, on leaving the plaintiffs' employment, he would not "carry on the business of White Ant Exterminator or Fumigator anywhere in the Island of Singapore either by himself or in partnership with others nor shall he take employment with any person, firm or corporation carrying on the business of White Ant Exterminators or Fumigators or any such similar business until the period of three years has expired". After leaving the plaintiffs' employment, the defendant became a director in the Fumigation and Pest Control Co. Ltd., a company carrying on business as White Ant and General Pest Exterminators and Fumigators. The plaintiffs brought this action to restrain the defendant from being in breach of the above covenant.

Held: (1) although the covenant was reasonably necessary for the protection of the plaintiffs' business with regard to space and time as well as the nature of the defendant's employment, it was against public policy since to prevent the defendant from operating as a fumigator in Singapore would give the plaintiffs a virtual monopoly of the business. Hence the covenant was void and could not be enforced.

(2) the covenant, being a single covenant for the protection of the plaintiffs' whole business and not two covenants for the protection of the plaintiffs' two businesses, it could not be severed so as to allow its enforcement in part.

Cases referred to:—

(1) *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ltd.* [1894] A.C. 535.

(2) *Underwood & Son* v. *Barker* [1899] 1 Ch. 300.

(3) *Attwood* v. *Lamont* [1920] 3 K.B. 571.

ACTION.

J. Grimberg for the plaintiffs.

E. W. Barker for the defendant.

Cur. Adv. Vult.

Chua J.: This action is brought to restrain the defendant, a former employee of the plaintiffs, from continuing to commit a breach of a restrictive term contained in a written agreement dated the 3rd August, 1955. By that agreement it was provided that the defendant

"On leaving the services of the employer for any reason whatsoever either pursuant to this Agreement or on any breach of this Agreement shall not carry on the